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## Reasons for decision

Canadian Union of Postal Workers,

*applicant,*

*and*

Critical Path Couriers Ltd.,

*employer.*

Board File: 28760-C

Neutral Citation: 2011 CIRB 604

September 19, 2011

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The Board was composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. André Lecavalier and Norman Rivard, Members.

### Representatives

Mr. Irwin Nanda, for Canadian Union of Postal Workers;

Ms. Lyndsay A. Wasser, for Critical Path Couriers Ltd.

These Reasons for Decision were written by Ms. Elizabeth MacPherson, Chairperson.

### **I–Nature of the Application**

[1] The above-cited matter was considered by a panel of the Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. André Lecavalier and Norman Rivard, Members.

[2] On May 16, 2011, the Canadian Union of Postal Workers (CUPW or the union) applied to the Board for certification as the bargaining agent for a unit of bicycle and walking couriers employed by Critical Path Couriers Ltd. (Critical Path or the employer) in Toronto, Ontario.

[3] Critical Path raised two preliminary objections to the union's application. Firstly, it submits that its operations are provincially regulated for labour relations purposes. Secondly, if the employer is federally regulated, the employer submits that none of the persons in the proposed bargaining unit is an "employee" within the meaning of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). If either of these objections is sustained, the Board would not have jurisdiction to deal with the application.

[4] The Board sought and obtained further information from the parties and pleadings closed on July 27, 2011. Having reviewed the documentation on file, the Board is of the opinion that the written record is sufficient to permit it to deal with the preliminary objections to the application and therefore exercises its discretion pursuant to section 16.1 of the *Code* to decide these issues without an oral hearing.

## **II-Facts**

[5] Critical Path provides urgent and specialized deliveries of packages within Ontario and freight forwarding services to locations outside of Ontario. It also operates a large warehouse, which is used for storage and "pick and pack" activities and an office that supports its delivery and freight-forwarding operations.

[6] Critical Path specializes in the delivery of items that cannot be handled by Canada Post Corporation (CPC). These include temperature controlled items (perishable goods and pharmaceutical products); vaccines, blood and human tissue; dangerous goods including narcotics;

furniture; art work; flowers; car, helicopter and aircraft parts; and fragile items. The items that it deals with must be delivered within short time frames, from 30 minutes to same-day. Except in very rare cases, explained below, the deliveries made by Critical Path couriers are entirely within Ontario.

[7] With respect to its freight-forwarding services, Critical Path does not own or operate the means by which the freight is transported out of Ontario. It solicits freight from customers, consolidates it and arranges for various independent third party agents to transport and deliver the freight to recipients outside of Ontario. Critical Path does not have any employees or business locations outside of Ontario and, with one exception, Critical Path's couriers do not travel outside of the province of Ontario. The exceptional case arises when there is a "chain of signature" requirement, such as in the case of narcotics, when a courier may travel outside of Ontario to make a delivery.

[8] In order to provide these delivery services, Critical Path enters into contractual arrangements with some 38 couriers. At the time of the union's application, a total of 8 couriers were engaged in making deliveries by bicycle (7) or on foot (1) and the remainder used motorized vehicles (cars, vans or trucks). The evidence submitted indicates that 68% of the company's revenue is derived from the work done by motorized vehicles and 11% is earned by the bicyclists. The remainder of the company's revenue is attributed to logistics (10.6%), digital tape storage and shipping (6.6%) and warehousing and other services (3.8%).

### **III—Positions of the Parties**

#### ***A—Critical Path***

[9] Critical Path argues that it does not engage in any work, undertaking or business that is within the authority of the Parliament of Canada, and in particular that it does not provide "postal services" within the meaning of section 91(5) of *The Constitution Act, 1867*, nor do its operations extend beyond the boundaries of the province so as to bring it within federal jurisdiction.

[10] Critical Path states that it does not have any contracts with or connection to CPC, nor does it compete with the postal services provided by CPC. Critical Path argues that its business does not

focus on delivering mailable matter within the meaning of the *Canada Post Corporation Act* (*CPC Act*) and that a majority of its operations consist of transporting and delivering items that do not fall within the definition of mailable matter. Critical Path argues that, to the extent that it engages in the delivery of mailable matter (envelopes and small packages), this work constitutes only a minor part of its business. Critical Path therefore contends that it is not engaged in providing a postal service.

[11] Critical Path also argues that it is not engaged in an interprovincial or international business, as all the deliveries made by the couriers are entirely within Ontario. Critical Path argues that the exceptional assignments that oblige a courier to travel outside of the province constitute less than 1% of the employer's business, as they occur only one or two times a year and are not a regular and continuous part of its operations. It states that, although it offers freight-forwarding services, just as was the case in *Consolidated Fastfrate v. Western Canada Council of Teamsters*, 2009 SCC 53; 3 S.C.R. 407, Critical Path does not own or operate the means by which the freight is transported out of Ontario and therefore is not within federal jurisdiction.

[12] Critical Path argues in the alternative that, even if its operations are within federal jurisdiction, the individuals performing the work are not employees within the meaning of the *Code* and therefore are not subject to the provisions of that statute. Critical Path states that its couriers do not have set hours, but are entitled to determine their start and end times each day. It states that the couriers may accept or decline deliveries offered to them and are not obliged to work exclusively for Critical Path. It submits that all aspects of the delivery are determined by the courier acting on the customer's instructions. In its submissions, Critical Path states that its couriers do not wear Critical Path uniforms or name tags and provide their own equipment, including bicycles, helmets and delivery bags.

[13] The couriers rent radios from Critical Path for a fee and can engage helpers to make deliveries on their behalf. The couriers work solely on commission, with no guaranteed daily minimum, and are required to correct any delivery mistakes without any additional compensation. Couriers negotiate their commission rate individually, although there is a standard rate offered by the company. Critical Path will cease utilizing a courier's services if he/she engages in conduct that

could damage the company's relationship with its customers. The couriers are paid bi-weekly, do not participate in Critical Path's employee benefit program and are treated as independent contractors for tax purposes (there are no deductions at source for income tax, Canada Pension Plan, Employment Insurance or Workers' Compensation).

***B-CUPW***

[14] CUPW relies on the Board's decision in *TurnAround Couriers Inc.*, 2010 CIRB 544, for the proposition that Critical Path is engaged in providing a postal service within the meaning of the *Constitution Act, 1867* and that its operations are therefore within federal jurisdiction. It states that Critical Path bicycle and walking couriers pick up and deliver mailable matter, identical work to that performed by the employees of TurnAround Couriers Inc. (TurnAround), which the Board found was in federal jurisdiction.

[15] CUPW argues that the couriers are dependent contractors, and therefore employees, within the meaning of the *Code*. The union states that all facets of the courier's work and earnings at Critical Path are controlled by Critical Path's dispatch system, and they must remain in communication with dispatch at all times so that dispatch knows their whereabouts and the calls they have in their possession. In particular, CUPW points to a document issued by Critical Path on November 26, 2010, in which Critical Path reminded couriers that they must be available for work from 8am to 6pm daily, and that they must contact the office if they wish to book time off. Furthermore, the couriers are required to report to management any incidents that occur while they are delivering on behalf of Critical Path.

[16] CUPW also submits that the couriers hired by Critical Path are not, in practice, able to work for any other courier companies, as Critical Path insists that they be available during working hours. It suggests that a courier would not be assigned further work by Critical Path if he/she was regularly unavailable at the times demanded by Critical Path. CUPW argues that, by the terms of the contracts that the couriers are required to sign and its policies, Critical Path does not control merely the result of the work but also its performance. It is Critical Path, not the couriers, that manages the

relationships with clients and invoices them and the couriers have no say in the rates charged to the clients. Furthermore, Critical Path controls the commission rate and has in the past unilaterally reduced commissions without consulting the couriers.

#### **IV—Analysis and Decision**

[17] It is trite law to say that provincial competence over labour relations is the rule, and federal competence is the exception. Federal competence exists only when the work performed by the employees is an integral part of an undertaking within federal jurisdiction. The analysis requires consideration of the employer's operations as a whole in order to determine which legislative authority applies (see *Canada Labour Relations Board et al. v. Yellowknife*, [1977] 2 S.C.R. 729).

[18] The analysis in this case therefore requires the Board to characterize Critical Path's operations, in order to determine whether they fall within any of the exceptions to the general rule of provincial jurisdiction.

[19] In the TurnAround case relied upon by the union, the evidence was that the pith and substance of the employer's business was the collection, transportation and delivery, for a fee, of small items capable of being carried by someone on foot or on a bicycle. The items handled by TurnAround were generally letters and small packages that met the definition of "mailable matter" found in the *CPC Act*. But for their time sensitive nature, these items could have been carried by CPC in the normal course of its operations. It was on this basis that the Board found that TurnAround was engaged in providing a postal service.

[20] The facts in the instant case are different. The primary focus of Critical Path's operations is not the collection, transportation and delivery of mailable matter. The evidence presented indicates that the company has various business lines, including the collection, transportation and delivery of both mailable and non-mailable items, as well as freight-forwarding. On the basis of this evidence, the Board has been persuaded that the company primarily specializes in dealing with items that are not mailable, either because of their nature (for example, perishable or dangerous) or size, and that these operations are readily distinguishable from those at issue in *TurnAround Couriers Inc., supra*. In the



Board's opinion, the small portion of Critical Path's operations that involves dealing with mailable matter is not severable from its overall operations. The Board is therefore unable to find that Critical Path is engaged in postal services and regulated by the *Code*.

[21] The Board also notes that the manner in which Critical Path has organized the portion of its operations relating to freight-forwarding is identical to that found by the Supreme Court of Canada to be a matter of provincial responsibility in *Consolidated Fastfrate, supra*. The Board is of the opinion that the small number of out of province assignments undertaken by Critical Path do not constitute a regular and continuous part of its operations so as to bring the employer into federal jurisdiction.

[22] Accordingly, the Board concludes that the operations of Critical Path Couriers Ltd. fall within provincial jurisdiction and the Board has no authority to consider the union's application for certification in respect of the company's bicycle and walking couriers.

[23] Given this finding, it is not necessary for the Board to consider whether Critical Path's couriers are employees within the meaning of the *Code*.

[24] The application for certification is dismissed for lack of jurisdiction. This is a unanimous decision of the Board.

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Elizabeth MacPherson  
Chairperson

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André Lacavalier  
Member

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Norman Rivard  
Member